Nos. 07-1601 and 07-1607

In the Supreme Court of the United States

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

SHELL OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Solicitor General
Counsel of Record
MICHAEL J. GUZMAN
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
LISA E. JONES
JAMES R. MACAYEAL
AARON P. AVILA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

PATRICIA K. HIRSCH
Acting General Counsel
Environmental Protection Agency
Washington, D.C. 20460

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the district court's determination that petitioner Shell Oil Company is liable under Section 107(a)(3), 42 U.S.C. 9607(a)(3), of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, as an entity that "arranged for disposal" of hazardous substances.

2. Whether the court of appeals properly held petitioners jointly and severally liable under CERCLA for the response costs of the United States and California governments, based on the court's conclusion that petitioners did not satisfy their evidentiary burden of providing a reasonable basis to apportion liability.

TABLE OF CONTENTS

Page

Statement 1
Summary of argument 12
Argument 16
I. Shell is liable under the terms of CERCLA because it "arranged for disposal" of a hazardous substance and not merely for a sale 16
A. Shell was properly held liable as an arranger under Section 107(a)(3), based on its entry into transactions that it knew would directly result in disposals of hazardous substances 17
1. Arranger liability is not limited to transactions designed primarily for disposal 17
2. Shell's knowledge and role in the disposal of its hazardous substances during its arrangement with B&B creates arranger liability 20
B. Shell identifies no sound basis for limiting arranger liability where a manufacturer engages in transactions that it knows will directly result in disposals of its hazardous substances 23
1. Lack of intent to dispose of a hazardous substance during a transaction does not preclude arranger liability where the arranger has advance knowledge of the disposal 24
2. Section 107(a)(3) encompasses the disposal of hazardous substances through spills and leaks 26
3. Arranger liability does not require ownership or actual control of the hazardous substance at the time of disposal 27

Table of Contents—Continued: Page

II. The district court erred in refusing to hold petitioners jointly and severally liable when petitioners failed to establish a reasonable basis for apportionment 29
A. Consistent with Restatement principles, CERCLA liability for a single harm is joint and several unless the liable party proves a reasonable basis for apportionment 30
B. The district court erred as a matter of law by declining to impose joint and several liability after petitioners failed to establish any reasonable basis to apportion liability 35
C. The district court's unsubstantiated assumptions and gross approximations do not constitute a reasonable basis to apportion the harm in this case 42
1. There is no reasonable basis to assume that each petitioner's share of the ultimate harm is proportional to its volumtric contribution to the contamination 43
2. There is no reasonable basis to assume that the Railroads' contribution to the contamination was proportional to its land area and duration of ownership. 45
3. There is no reasonable basis for the district court to assume that 2/3 of the contamination was from dinoseb and Nemagon (and thus discount the Railroads' liability by 1/3) 49
4. There is no reasonable basis for using spillage estimates from anecdotes and incomplete records to determine Shell's contribution to the contamination 50

Table of Contents—Continued: Page

Conclusion 53
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Amcast Indus. Corp. v. *Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), cert. denied, 510 U.S. 1044 (1994) 25
Bell Petroleum Servs., Inc., In re, 3 F.3d 889 (5th Cir. 1993) 45
Browning-Ferris Indus. of Ill., Inc. v. *Ter Maat*, 195 F.3d 953 (7th Cir. 1999), cert. denied, 529 U.S. 1098 (2000) 44
Burdett v. *Miller*, 957 F.2d 1375 (7th Cir. 1992) 41
Catellus Dev. Corp. v. *United States.*, 34 F.3d 748 (9th Cir. 1994) 25
Centerior Serv. Co. v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998) 3
Chem-Nuclear Sys., Inc. v. *Bush*, 292 F.3d 254 (D.C. Cir. 2002) 4
Florida Power & Light Co. v. *Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990) 24
Freeman v. *Glaxo Wellcome, Inc.*, 189 F.3d 160 (2d Cir. 1999) 24
Hormel v. *Helvering*, 312 U.S. 552 (1941) 37
Louisiana & Nashville R.R. v. *Mottley*, 219 U.S. 467 (1911) 26
Morton Int'l, Inc. v. *A.E. Staley Mfg. Co.*, 343 F.3d 669 (3d Cir. 2003) 19

Cases—Continued: Page

Norfolk & W. Ry. v. *Ayers*, 538 U.S. 135 (2003) 31
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989) 2, 3
Pneumo Abex Corp. v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769 (4th Cir.), cert. denied, 525 U.S. 963 (1998) 24
South Fla. Water Mgmt. v. *Montalvo*, 84 F.3d 402 (11th Cir. 1996) 19
United States v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) 3, 17, 18, 19
United States v. *Alcan Aluminum Corp.*:
990 F.2d 711 (2d Cir. 1993) 3
315 F.3d 179 (2d Cir. 2003), cert. denied, 540 U.S. 1103 (2004) 38
United States v. *Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992) 3
United States v. *Atlantic Research Corp.*, 127 S. Ct. 2331 (2007) 34
United States v. *Bestfoods*, 524 U.S. 51 (1998) 2, 3, 18, 19, 30
United States v. *Capital Tax Corp.*, 545 F.3d 525 (7th Cir. 2008) 35
United States v. *Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) 4
United States v. *Hercules, Inc.*, 247 F.3d 706 (8th Cir.), cert. denied, 534 U.S. 1065 (2001) 4, 33, 35, 46
United States v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) 3, 33

Cases—Continued: Page

United States v. *Rohm & Haas Co.*, 2 F.3d 1265 (3d Cir. 1993), overruled on other grounds, *United States* v. *E.I. DuPont De Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005) 34, 46, 47

United States v. *Township of Brighton*, 153 F.3d 307 (6th Cir. 1998) 33

Williams v. *Taylor*, 529 U.S. 420 (2000) 27

Statutes:

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*:

42 U.S.C. 9601(29) 17, 26, 1a

42 U.S.C. 9604(a) 2

42 U.S.C. 9607(a) (§ 107(a)) ..... *passim*

42 U.S.C. 9607(a)(1)-(2) (§ 107(a)(1)-(2)) 6, 47, 1a

42 U.S.C. 9607(a)(1)-(4) 3, 1a

42 U.S.C. 9607(a)(1) (§ 107(a)(1)) 15, 49, 1a

42 U.S.C. 9607(a)(2) (§ 107(a)(2)) 27, 1a

42 U.S.C. 9607(a)(3) (§ 107(a)(3)) ..... *passim*

42 U.S.C. 9607(a)(4)(A) (§ 107(a)(4)(A)) ..... *passim*

42 U.S.C. 9607(b) 3, 3a

42 U.S.C. 9607(b)(3) (§ 107(b)(3)) 6, 47, 3a

42 U.S.C. 9607(*o*)-(r) (§ 107(*o*)-(r) (Supp V. 2005)) 5

42 U.S.C. 9607(*o*) (§ 107(*o*)) (Supp. V 2005) 4

42 U.S.C. 9607(p) (§ 107(p)) (Supp. V 2005) 4

42 U.S.C. 9607(q) (§ 107(q)) (Supp. V 2005) 5

Statutes—Continued: Page

42 U.S.C. 9607(r) (§ 107(r)) (Supp. V 2005) 5
42 U.S.C. 9613(f) (§ 113(f)) 4, 14, 34, 40
42 U.S.C. 9613(f)(1) (§ 113(f)(1)) 4, 15, 34, 4a
42 U.S.C. 9622(g) (2000 & Supp. V 2005) 5
42 U.S.C. 6903(3) 17, 27, 1a
40 C.F.R. Pt. 300 3

Miscellaneous:

126 Cong. Rec. (1980):
p. 26,788 39
p. 31,978 30
H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. I (1985) ... 31
Letter from Assistant Attorney General, Office of Legislative Affairs to Chairman, Subcomm. on Transportation and Commerce, House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. (Dec. 1, 1980), 126 Fed. Reg. 31,966 n.* (1980) 33
Letter from GAO to Hon. James M. Jeffords regarding the GAO-04-475R Superfund Program (Feb. 18, 2004) 31
Random House Dictionary of the English Language (2d ed. 1987) 17
Restatement (Second) of Torts (1965) ..... *passim*
Restatement (Third) of Torts: Apportionment of Liability (2000) 31
S. Rep. No. 848, 96th Cong., 2d Sess. (1980) 3, 28, 30
U.C.C. § 2-319(1)(b) (14th ed. 1995) 21

Miscellaneous—Continued: Page

Webster's Third New International Dictionary (1976) 17

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

STATEMENT

This case arises from actions taken by the United States and the State of California to address hazardous-substance contamination at a former agricultural chemical storage and distribution facility located in Arvin, California. The United States and the State brought a cost-recovery action against petitioners, two railroad companies (the Railroads) and a chemical manufacturer (Shell), under CERCLA Section 107(a), 42 U.S.C.

9607(a), which authorizes federal and state governments to recover their response costs from persons who have a statutorily specified nexus to the contamination. After a bench trial, the district court found the Railroads and Shell to be liable parties under CERCLA, and further found that the Railroads and Shell were liable for 9% and 6% of the response costs, respectively. Pet. App. 82a-262a. The court of appeals affirmed in part and reversed in part, holding that Shell was a liable party and that petitioners were jointly and severally liable for the full costs of the cleanup activities undertaken by the United States and California. *Id.* at 1a-57a.

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citation omitted).

The Environmental Protection Agency (EPA) is authorized to clean up a contaminated site, drawing from the federal government's Superfund, and then to sue to recover its cleanup costs. 42 U.S.C. 9604(a), 9607(a)(4)(A). To establish a prima facie case, the United States must show that a "release" or "threatened release" of a "hazardous substance" from a "facility" has caused the United States to incur cleanup costs. 42 U.S.C. 9607(a). The United States must further establish that the defendant falls within at least one of four classes of covered persons: (1) the owner and operator of the facility, (2) the owner or operator of the facility at the time that disposal of hazardous substances occurred, (3) persons who "arranged for disposal" or treatment of

hazardous substances, and (4) certain transporters of hazardous substances. 42 U.S.C. 9607(a)(1)-(4).

Subject to limited defenses not implicated in these cases, any person within the categories described above is liable to the government for "all costs of removal or remedial action incurred" by the United States "not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A) and (b); 40 C.F.R. Pt. 300. Under the apportionment rules developed by lower federal courts pursuant to pre-existing common-law principles, a covered party is jointly and severally liable to the government for the entire amount of response costs unless it proves that the harm from the release of hazardous substances is divisible.[1] That rule furthers Congress's purpose of ensuring that the costs of remediation are borne by those with a defined nexus to the contamination, rather than by the general public. See *Bestfoods*, 524 U.S. at 56 n.1 ("The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.") (quoting *Union Gas Co.*, 491 U.S. at 21 (plurality opinion of Brennan, J.)); S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980) (stating Congress's "goal of assuring that those who caused chemical harm bear the cost of that harm").

In analyzing divisibility of harm in Section 107(a)(4)(A) actions, courts follow the Restatement (Sec-

[1] See, *e.g.*, *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 721-722 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 268-269 (3d Cir. 1992); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 171-172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

ond) of Torts (1965) (Restatement). See, *e.g.*, *United States* v. *Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001) (recognizing Restatement as the "universal starting point"), cert. denied, 534 U.S. 1065 (2001); *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983) (establishing framework). Restatement § 433A provides that damages may be apportioned where there are distinct harms or where there is a "reasonable basis for determining the contribution of each cause to a single harm." The party seeking apportionment has the burden of proof. See Restatement § 433B(2); see also, *e.g.*, *Chem-Dyne*, 572 F. Supp. at 810. Where a liable party cannot meet its burden, it is jointly and severally liable "for the full amount of the harm." *Chem-Nuclear Sys., Inc.* v. *Bush*, 292 F.3d 254, 260 (D.C. Cir. 2002).

A party held jointly and severally liable may file a separate contribution action pursuant to CERCLA Section 113(f)(1) against other liable or potentially liable parties. 42 U.S.C. 9613(f)(1). Section 113(f), added six years after CERCLA's enactment, reflects Congress's compromise response to the potentially disproportionate burden placed on certain covered parties by CERCLA's liability provisions. Section 113(f)(1) provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Ibid.*[2]

[2] Congress has also amended CERCLA in other ways to limit the breadth of CERCLA liability. In January 2002, for example, Congress enacted an exemption from liability at National Priority List (NPL) sites for those persons who sent less than 110 gallons of liquid materials or less than 200 pounds of solid materials to the site (§ 107(*o*)); an exemption for certain categories of persons from liability at NPL sites for disposing of municipal solid waste (§ 107(p)); a defense to liability for certain owners of property located contiguous to, and contaminated by,

2. In 1960, Brown & Bryant, Inc. (B&B) began to operate an agricultural chemical distribution business on a 3.8-acre parcel of land (the B&B parcel). Pet. App. 12a. In 1975, B&B expanded its operations by leasing a 0.9-acre parcel owned by the Railroads (the Railroad parcel) that adjoined the B&B parcel to the west. *Ibid.* B&B used the Railroad parcel as an "integral part" of its agricultural chemical operations and treated the two parcels as a single facility. *Id.* at 86a. The Railroad parcel was graded toward a pond on the B&B parcel. *Id.* at 12a. B&B ceased operating the facility in 1989 and is now insolvent. *Id.* at 83a-84a.

Among the Shell-manufactured products stored and distributed at B&B's facility were two pesticides, D-D and Nemagon. Pet. App. 13a. B&B also stored dinoseb, a weed killer, supplied by another company. *Ibid.* Chemical constituents of all three products have been banned by EPA or withdrawn from use as pesticides due to threats to human health and the environment. Gov't C.A. E.R. 69-70. EPA has also listed the relevant constituents to be hazardous substances for CERCLA purposes. Pet. App. 174a.

During their transfer and storage, the chemicals routinely spilled and leaked onto both parcels. Pet. App. 13a-14a, 130a. Over the course of the facility's operation, hazardous substances entered the subsurface, cre-

hazardous waste sites (§ 107(q)); and a defense to liability for bona fide prospective purchasers of contaminated property (§ 107(r)). 42 U.S.C. 9607(*o*)-(r) (Supp. V 2005). In addition, those who do not qualify for Section 107(*o*)'s exemption, but who sent a relatively small amount of hazardous substances to a site, may enter into a de minimis settlement, under which they make a limited cash payment to EPA in exchange for an immediate release from past and future liability at the site. 42 U.S.C. 9622(g) (2000 & Supp. V 2005).

ating areas of contaminated soil and, of particular concern, a plume of contaminated groundwater that threatens municipal drinking water supplies. *Id.* at 14a, 172a-174a, 245a-246a. After investigations, the United States and the State began to clean up the contamination at the facility pursuant to their response authority under CERCLA. *Id.* at 14a-15a.

3. In 1996, the United States and the State filed suit under CERCLA Section 107(a) to recover their response costs, naming as defendants B&B, the Railroads, and Shell. In 2003, after a bench trial, the district court issued its Amended Findings of Fact and Conclusions of Law. Pet. App. 82a-262a.

a. The district court held that the United States and the State had established a prima facie case of CERCLA liability. Pet. App. 163a-219a. The court determined that the entire site, encompassing both the B&B and Railroad parcels, constitutes a single "facility." *Id.* at 172a-173a. The court found that site operations released hazardous substances "from and located throughout the facility, particularly in the form of contaminated groundwater," and that the plume "poses an indivisible threat of leaching and diffusing contaminants to lower groundwater suitable for drinking." *Id.* at 172a. The court further found that the soil and groundwater at the facility are contaminated with, among other hazardous substances, the constituents of the two Shell products as well as dinoseb. *Id.* at 88a, 174a.

The district court found that the Railroads were responsible parties under CERCLA Section 107(a)(1)-(2), 42 U.S.C. 9607(a)(1)-(2), as owners of the facility and as owners of the facility at the time of disposal. Pet. App. 176a-179a, 186a-187a. The court rejected the Railroads' proffered defense under CERCLA Section 107(b)(3), 42

U.S.C. 9607(b)(3), under which a defendant must show that "the release or threatened release was caused solely by an unrelated third party." Pet. App. 180; see *id.* at 184a-187a. The court explained that "[a] 'contractual relationship' between the Railroads and B&B existed," that the Railroads "periodically inspected B&B's plant and had actual knowledge" of B&B's operations, and that "B&B used the leased parcel to store chemicals where leaks would often occur." *Id.* at 184a-185a; see *id.* at 176a, 178a-179a. The court further determined that the Railroads had "submitted no evidence that they took any action to prevent or mitigate their lessee's conduct on the Site, which ignored the hazards of continuous spills, releases and reckless practices in the unloading, storage, formulating and loading of toxic ag-chemicals." *Id.* at 185a. The court found that the Railroads had "failed to show that they acted with due care" or "took any precautionary actions against the foreseeable results of B&B's activities in storing and handling hazardous ag chemicals on the Railroad parcel." *Ibid.*

The district court also held that Shell was liable pursuant to CERCLA Section 107(a)(3), 42 U.S.C. 9607(a)(3), as a party who had "arranged for disposal" of hazardous substances. Pet. App. 204a, 208a-213a. The court found that Shell had "determined and arranged for the means and methods of delivery of the D-D to the Arvin plant"; that Shell had "hired common carrier delivery trucks to haul D-D to B&B's Arvin plant"; that B&B was required to follow the Shell manual which provided "detailed loading and unloading procedures"; and that over one period Shell had "required B&B to store highly corrosive D-D in bulk tanks, at a time when the distributors did not have the equipment or capital to deal with the corrosive D-D." *Id.* at 208a-209a. The

court further found that Shell "was an active participant in the D-D shipment, delivery and receiving process at Arvin with knowledge that spills and leaks of hazardous D-D were inherent and inevitable," and that such spills and leaks "occurred throughout the period Shell sold D-D to B&B." *Id.* at 204a.

b. The district court then addressed whether the Railroads and Shell should be held jointly and severally liable for the response costs incurred by the United States and the State.

The district court found that the harm at the site "is a single harm which consists of contaminated soil at various locations and depths around the Site and one mass (plume) of contaminated groundwater." Pet. App. 245a-246a. The court also explained that the Railroads and Shell had presented no evidence or argument to demonstrate a reasonable basis for apportioning that harm:

> Apportionment in this case is exacerbated by defendants' "scorched earth," all-or-nothing approach to liability. Neither acknowledged an iota of responsibility, in the case of Shell, for causing "releases of hazardous substances,["] and in the case of the Railroads, that any release of hazardous substance that required response occurred on [the] Railroad parcel throughout the 13 year lease terms.

Id. at 236a. The court further found that "no party has specifically documented the relative contributions of contamination from either parcel," *id.* at 248a, and that there is "no evidence to quantify the difference in volume of the releases" from the Railroad and B&B parcels, *id.* at 252a.

The district court summarized the situation before it by stating that "[a]ll parties" to the suits had "effec-

tively abdicated providing any helpful arguments to the court." Pet. App. 236a-237a. In the court's view, that dearth of assistance from the parties had "left the court to independently perform the equitable apportionment analysis demanded by the circumstances of the case." *Id.* at 237a. In determining the percentage of the total response costs for which the Railroads would be held liable, the district court calculated the surface area of the Railroad parcel to be 19.1% of the total site surface area and the 13-year duration of the B&B-Railroad lease to be 45% of the site's total 29 years of operation. *Id.* at 247a. The court assumed that none of the D-D contamination originated from the Railroad parcel and that Nemagon and dinoseb "contributed to 2/3 of overall Site contamination." *Id.* at 251a. The court then multiplied the three percentages and arrived at 6%. *Id.* at 252a. The court adjusted the Railroads' liability, "[a]llowing for calculation errors up to 50%," to 9% of the total response costs. *Ibid.*

The district court acknowledged that "Shell did not present evidence how its products' contribution to the contamination at the Arvin facility can be apportioned." Pet. App. 252a. The court nonetheless estimated the amount of D-D spilled during "Shell controlled" deliveries and then the amount of D-D spilled for all other activities. *Id.* at 256a. Dividing the estimated volume spilled during Shell-controlled deliveries by the total estimated volume of D-D spills, the court held Shell severally liable for 6% of the response costs. *Id.* at 256a-257a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-81a.

a. The court of appeals affirmed the district court's ruling that Shell is a liable party under CERCLA as one

who "arranged for disposal" of hazardous substances. Pet. App. 44a-55a. The court observed that "arranger" liability extends not only to direct arrangements for disposal of hazardous substances, but also to arrangements in which such disposal is a foreseeable byproduct (though not the purpose) of the transaction. *Id.* at 48a-50a. The court noted that CERCLA's definition of "disposal" includes the unintentional processes of "spilling" and "leaking." *Id.* at 50a-51a. The court inferred from that definition that "an entity can be an arranger even if it did not intend to dispose of the product. Arranging for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient." *Id.* at 51a.

The court of appeals then recounted the evidence supporting "arranger" liability here:

> (1) Spills occurred *every time* the deliveries were made; (2) Shell arranged for delivery and chose the common carrier that transported its product to the Arvin site; (3) Shell changed its delivery process so as to require the use of large storage tanks, thus necessitating the transfer of large quantities of chemicals and causing leakage from corrosion of the large steel tanks; (4) Shell provided a rebate for improvements in B & B's bulk handling and safety facilities and required an inspection by a qualified engineer; (5) Shell regularly would reduce the purchase price of the D-D, in an amount the district court concluded was linked to loss from leakage; and (6) Shell distributed a manual and created a checklist of the manual requirements, to ensure that D-D tanks were being operated in accordance with Shell's safety instructions.

Pet. App. 53a-54a. The court held that the district court's findings "demonstrate that Shell had sufficient control over, and knowledge of, the transfer process to be considered an 'arranger,' within the meaning of CERCLA, for the disposal of the chemicals that leaked." *Id.* at 55a.

b. The court of appeals reversed the district court's apportionment of harm and held petitioners jointly and severally liable for the full costs of the response actions, except for a "Dinoseb hot spot" for which Shell was not liable. Pet. App. 19a-47a, 56a-57a.

After agreeing that the harm in this case was theoretically capable of apportionment, the court of appeals reviewed the district court's actual apportionment for clear error, using Restatement § 433A as its starting point. Pet. App. 22a, 36a-37a. With respect to the Railroads, it held that the district court's apportionment calculation (based solely on percentage of land area, duration of ownership, and the Railroads' responsibility for two of the three distinct contaminants at the site) lacked a reasonable basis in the record. *Id.* at 37a-44a. The court concluded that the numbers the district court had used "bore insufficient logical connection to the pertinent question: What part of the contaminants found on the Arvin parcel were attributable to the presence of toxic substances or to activities on the Railroad parcel?" *Id.* at 43a.

With respect to Shell, the court of appeals held that the evidence produced at trial was insufficient to formulate even a rough approximation of Shell's proportional share of the site contamination. Pet. App. 44a-45a. The court found that the leakage evidence in the record did not provide a reasonable basis to sustain the district court's analysis because the site was contaminated with

a number of chemicals, and because Shell had failed to introduce any evidence from which a court could identify the percentage of the soil contamination that was attributable to its leaked chemicals. *Ibid.* As the court explained, the record lacked that evidence "most likely because Shell put its eggs in the no-liability basket." *Id.* at 47a.

SUMMARY OF ARGUMENT

CERCLA's critical cost-recovery remedy is designed to place the costs of cleaning up contamination from hazardous substances on parties who have a demonstrated nexus to the contamination, rather than on the general public. Because Shell knew that its contract to supply B&B with agricultural chemicals directly and routinely resulted in spills and leaks that expressly qualify as disposals of hazardous substances covered by CERCLA, Shell is liable as an "arranger" of those disposals. And because neither Shell nor the Railroads established a reasonable evidentiary basis for apportioning the single harm at issue here, the court of appeals correctly held that those parties were jointly and severally liable for the response costs at issue.

I. A. Congress specified that a party may be liable under CERCLA if it "arrange[s] for" activities whose direct and anticipated consequence is the "disposal" of hazardous substances, even if that disposal is not the purpose of the transaction. Although CERCLA does not define the term "arrange for," it defines "disposal" to include the acts of spilling and leaking. That definition implies that arranger liability is not limited to transactions involving intentional disposals. That interpretation is consistent both with the common law (under which a party may be held liable for arranging a trans-

action that it knows will create a nuisance, see Restatement § 427B), and with CERCLA's purpose of placing the costs of remediation on those responsible for the disposal of hazardous substances.

As the courts below found, the record in this case amply demonstrates that Shell arranged for and was an active participant in the delivery of its agricultural chemicals to B&B. Those deliveries directly and routinely resulted in disposals of hazardous substances (through spills and leaks) for more than 20 years, and Shell had actual knowledge of that fact. Under those circumstances, both the district court and court of appeals correctly determined that Shell had "arranged for disposal" of hazardous substances, and relieving Shell of its obligation to pay for response costs would directly contravene CERCLA's objective of holding responsible parties—rather than the taxpaying public—acountable for their activities.

B. Shell's proffered bases for avoiding arranger liability lack merit. The fact that a transaction involves the delivery of a useful product does not preclude arranger liability where (as here) the arranger knows that disposal of a hazardous substance—through spills and leaks, or otherwise—will occur during the course of the transaction. Moreover, contrary to Shell's contention, Section 107(a)(3) imposes liability if a person "arranged for disposal * * * of hazardous *substances*," not just hazardous *waste*.

Shell is also wrong in arguing that Section 107(a)(3) limits arranger liability to circumstances in which the defendant retains ownership, possession, or actual control of its hazardous substances *at the time of disposal*. That provision broadly encompasses "any person who by contract, agreement, or otherwise" arranges for some

"other party or entity" to dispose of its hazardous substances. Although Section 107(a)(3) refers to "hazardous substances owned or possessed by" the arranger, that language refers to ownership or possession *at the time the arrangement is made*. Shell's contrary rule, under which an arranger could escape liability simply by transferring ownership and control of its hazardous substances to another party who agrees to carry out the actual disposal, would render Section 107(a)(3) ineffectual in the paradigmatic arranger case.

II. A. Consistent with Restatement principles, the courts of appeals uniformly have held that Section 107(a)(4)(A) liability for a single harm is joint and several *unless* the defendant establishes a reasonable basis for apportioning the harm. At the same time, however, lower courts have uniformly recognized that, after joint and several liability has been imposed, a defendant may invoke the separate CERCLA provision authorizing suits for contribution, under which the court may weigh equitable factors in allocating costs, to seek from other responsible parties the portion of costs paid beyond its fair share. See 42 U.S.C. 9613(f)(1). That settled framework is consistent with the common law and permits courts fairly to divide response costs among responsible parties.

B. Rather than attempt to establish an evidentiary basis for apportioning costs in this case, the Railroads and Shell made a strategic choice to pursue a "'scorched earth,' all-or-nothing approach to liability." Pet. App. 236a. Nevertheless, despite acknowledging that neither the Railroads nor Shell had provided any evidentiary basis for apportionment, the district court performed what it called "the equitable apportionment analysis demanded by the circumstances of this case." *Id.* at

237a. That was error. The district court conflated its task of apportionment under Section 107(a) with the court's role in a separate contribution action under Section 113(f)(1), which authorizes consideration of a broad range of equitable factors. As a result, the district court felt compelled to apportion the harm in this case out of a sense of equity because the primary polluter was insolvent—notwithstanding the lack of a reasonable basis for apportionment. That approach was seriously flawed, both because it absolved petitioners of their burden of establishing a sound evidentiary basis for apportionment, and because under Restatement principles the insolvency of another responsible party weighs *against* rather than in favor of apportionment.

C. The district court's equitable apportionment relied on numerous unsubstantiated assumptions and gross approximations. First, there is no reasonable basis to assume that each petitioner's share of the ultimate harm is proportional to its volumetric contribution to the contamination. Each source of contamination may have been independently sufficient to have caused the harm requiring remediation, and the district court failed to account for the relative toxicities or costs of remediation of the different constituents—presumably because the record lacked that information. Second, there is no reasonable basis to assume that the Railroads' contribution to the contamination was proportional to their land area and duration of ownership. Geographic divisibility does not mean that a landowner is liable only for the percentage of the facility it owned. And temporal divisibility for landowners is inherently problematic (indeed, it can have the extreme consequence of negating landowner liability under Section 107(a)(1) altogether), especially where (as here) there is no reason to believe that the

degree of contamination remained constant over time. Third, there is no reasonable basis for the district court to have assumed that 2/3 of the total contamination was from dinoseb and Nemagon. Fourth, there is no reasonable basis for using estimates from anecdotes and incomplete records to determine the relative volume of Shell's spills, and the district court failed to account for various factors (*e.g.*, water, porosity, solubility) necessary to correlate those spill volumes with the actual contamination. The upshot is that the district court's apportionment analysis, on which petitioners rely, has no foundation in the record, or CERCLA.

ARGUMENT

I. SHELL IS LIABLE UNDER THE TERMS OF CERCLA BECAUSE IT "ARRANGED FOR DISPOSAL" OF A HAZARDOUS SUBSTANCE AND NOT MERELY FOR A SALE

CERCLA Section 107(a)(3) imposes liability on:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. 9607(a)(3). Shell agreed to supply agricultural chemicals to B&B, knowing that its chemicals were routinely spilled and leaked (*i.e.*, disposed of) during the delivery process. The court of appeals properly concluded that, by arranging that transaction, Shell "ar-

ranged for" the "disposal" (through the attendant spilling and leakage) of its hazardous substances.[3]

A. Shell Was Properly Held Liable As An Arranger Under Section 107(a)(3), Based On Its Entry Into Transactions That It Knew Would Directly Result In Disposals Of Hazardous Substances

1. Arranger liability is not limited to transactions designed primarily for disposal

CERCLA provides that individuals or entities that "arranged for" the disposal of hazardous substances may be held accountable for the costs of cleaning up those substances. 42 U.S.C. 107(a)(3). The dictionary defines "arrange" as "to prepare or plan." *Random House Dictionary of the English Language* 116 (2d ed. 1987); see *Webster's Third New International Dictionary* 120 (1976) ("to make preparations"). The term "disposal" is defined specifically in CERCLA, and it includes the *unintentional* acts of spilling and leaking. 42 U.S.C. 6903(3) ("The term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water."); see 42 U.S.C. 9601(29) (adopting definition of "disposal" in Section 6903(3)). If a party enters into a transaction that it *knows* will *directly* result in disposal of its hazardous substances including through spilling or leaking then it is naturally said to "arrange for" the disposal itself. See *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir.

[3] The Railroads' brief in this Court does not address whether Shell's conduct gave rise to arranger liability under Section 107(a)(3). In the court of appeals, however, the Railroads argued that the district court had correctly held Shell liable as an arranger, for several of the reasons explained herein. See Railroads Second C.A. Br. 16-38.

1989) (rejecting argument that defendants could be liable as arrangers "only if they *intended* to dispose of a waste") (emphasis added). Section 107(a)(3)'s use of the phrase "by contract, agreement, or *otherwise* arranged for," 42 U.S.C. 9607(a)(3) (emphasis added), reinforces that reading by making clear that the provision covers modes of "arrang[ing]" that do not involve an express contractual commitment.

That understanding of arranger liability also accords with the common-law background against which CERCLA was enacted, of which Congress was presumably aware. See, *e.g.*, *United States* v. *Bestfoods*, 524 U.S. 51, 63 (1998) (holding that common-law principles are to apply unless CERCLA "speak[s] directly to the question"); *Aceto*, 872 F.2d at 1382 (approving use of the common law to interpret CERCLA's arranger-liability provision). Restatement § 427B, for example, provides: "One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to * * * creat[e] * * * a private nuisance, is subject to liability for harm resulting * * * from such * * * nuisance." Cf. Restatement §§ 413, 416, 427, 427A. Arranger liability rests on the same principles. In this case, Shell employed common carriers (and contracted with B&B) to deliver hazardous substances that it knew would spill and leak during every delivery. See Pet. App. 259a; *infra*, pp. 20-23. Common-law understandings therefore support the imposition of liability on a party who arranges a transaction that it knows will directly result in the disposal of hazardous substances.[4]

[4] As the quotation from Restatement § 427B in the text indicates, a person who employed an independent contractor was traditionally liable not only when the employer possessed actual knowledge that the work would create a nuisance, but also when he "ha[d] reason to know" that

That construction of Section 107(a)(3) is also consistent with CERCLA's "sweeping" remedial purposes. *Bestfoods*, 524 U.S. at 56 n.1 (citation omitted); see, *e.g.*, *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 676 (3d Cir. 2003) ("Our view that 'arranged for' is to be broadly construed is consistent with Congress's overall purpose in enacting CERCLA."). When an entity arranges for activities that it knows will result in the disposal of hazardous substances, the imposition of liability under Section 107(a)(3) ensures that the costs of remediation can be placed on those who are responsible for, or who benefit from, the disposal of hazardous wastes. See p. 3, *supra*; *South Fla. Water Mgmt.* v. *Montalvo*, 84 F.3d 402, 407-409 (11th Cir. 1996) (noting importance for Section 107(a)(3) purposes of defendant's knowledge (or lack thereof) that hazardous substances would be spilled incident to pesticide spraying, because such knowledge would demonstrate that defendant "implicitly agreed to the disposal").[5]

such a result was "likely." Similarly, under Section 107(a)(3), the owner of hazardous substances may be liable as an "arranger" if he enters into a transaction whose likely consequence is the disposal of hazardous substances, even if the owner lacks actual knowledge that a disposal will occur. Because Shell was shown to have actual knowledge that spills and leaks routinely occurred during the deliveries, the Court need not determine in what additional circumstances arranger liability would be proper.

[5] Similarly, in *Aceto*, a pesticide manufacturer arranged to send its product to a formulator for processing (*i.e.*, converting from technical-grade to commercial-grade pesticide). 872 F.2d at 1375. As an "inherent" byproduct of the processing, the formulator generated hazardous substances, which the formulator disposed of contemporaneously (thereby creating the contaminated site). *Id.* at 1375-1376, 1381. Although disposal of the byproduct was not the purpose of the transaction (like Shell, both parties to the transaction in *Aceto* presumably would

2. *Shell's knowledge and role in the disposal of its hazardous substances during its arrangement with B&B creates arranger liability*

In contesting its liability, Shell relies on a characterization of the arrangement that was rejected by both the district court and court of appeals. Shell asserts (Br. 2, 14-15) that it merely sold a useful product, transported that product to B&B (its customer) by common carrier, and transferred ownership of the product to the customer when the common carrier arrived at the customer's facility. But that is not all that Shell did. As the courts below found, Shell arranged for the delivery and transfer process in which Shell was "deeply involved," Pet. App. 13a n.5 during which Shell knew disposals of its hazardous substances were a routine occurrence. *E.g.*, *id.* at 259a (noting Shell's "actual knowledge" that spills and leaks of D-D were "inherent in the unloading process"). Accordingly, this was not a situation where disposal of Shell's product was an unanticipated accident; the disposal was a known and inevitable (albeit unwanted) consequence of the transaction that Shell arranged. Shell's conduct therefore falls within the four corners of CERCLA's "arranger liability" provision.

a. It is undisputed that Shell arranged for the delivery of its D-D to B&B's facility. The "Conditions of Sale" between Shell and B&B provided that the "Seller may deliver any Product in any delivery equipment, by any means of transportation and from any shipping

have preferred no byproduct or disposal), the court of appeals held that the manufacturer was liable as an arranger under Section 107(a)(3). *Id.* at 1382. It explained that a contrary result "would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA." *Ibid.*

point that Seller may select." J.A. 583. Shell thus contractually reserved the exclusive authority to, and in fact did, arrange for the delivery of D-D by common carrier tanker trucks to B&B's facility. Pet. App. 124a. Shell owned the D-D at the time such arrangements were made. *Id.* at 124a-125a. The deliveries were made F.O.B. destination, but "Shell still controlled the process of deliveries, regardless." *Id.* at 124a.[6]

Shell also actively inserted itself into, and exercised significant control over, the transfer process when the tanker trucks it hired arrived at B&B's facility. At least until the early 1980s, the common carriers that Shell hired and paid participated in the D-D transfer process and used equipment required by Shell. See, *e.g.*, Pet. App. 119a-120a (relying on testimony of tanker-truck drivers and others in the field that the drivers would unload D-D into B&B's tanks using the truck's equipment); *id.* at 208a-209a ("Before the early 1980s, Shell required the tanker truck driver to have a 30 foot hose and certain couplings and other equipment," and "[b]y the early 1980s, Shell dictated that B&B personnel unload the tanker truck and purchase the 30 foot hose among other unloading equipment."). Shell documentation "referenced the fact that the drivers of the tanker trucks had to have certain equipment for transferring the D-D into the storage tank, evidencing direction and control by Shell." *Id.* at 124a. B&B was also required to follow Shell's manual on handling D-D, which provided

[6] "F.O.B. destination" generally means that "the seller must at his own expense and risk transport the goods to that place and there tender delivery of them." U.C.C. § 2-319(1)(b) (14th ed. 1995).

detailed loading and unloading procedures, subject to an inspection program. *Id.* at 127a-128a.[7]

b. The record establishes that spills of D-D "were inherent in the common carrier deliveries that Shell arranged for and occurred in the course of every delivery." Pet. App. 252a; see *id.* at 119a-122a. The trial evidence also showed, and the district court found, that "Shell knew that spills and leaks were inherent in the unloading process." *Id.* at 259a. For example, Robert Swain, a former Shell employee responsible for helping to implement Shell's manual on handling D-D, testified that the delivery of Shell D-D to bulk storage "always" resulted in spills. J.A. 64. Swain noted that, while spills during the truck-transfer process can be collected in a little bucket, "[m]ost often, though, back in those days, [the workers] just let it dump on the ground." *Ibid.*

Shell went so far as to account for the spilling and leakage of D-D in its contracts with B&B. Pet. App. 122a, 252a-253a. A Shell marketing agreement with B&B states, in a section entitled "Shrinkage," that "[s]ingle and multiple destination deliveries by common carrier will be allowed 0.5 percent on a weight basis for shrinkage that may occur at the time of unloading," and that the "shrinkage allowance will be deducted off the

[7] To the extent the courts below relied on Shell's imposition of various requirements, treatment of that fact as relevant to the Section 107(a)(3) analysis does not (as Shell suggests, Br. 31) create a disincentive to the adoption of such safeguards. To the contrary, if shippers know that the process by which their products are delivered results in spills of hazardous substances, they will have greater incentive to prevent such disposals to limit the contamination if they are potentially subject to arranger liability. In any event, abundant evidence beyond Shell's imposition of safety precautions established Shell's awareness that spills and leaks occurred routinely during the deliveries at issue here.

billing invoice." J.A. 498; see J.A. 209 (shrinkage allowances in Shell's bulk-liquid contracts applied to D-D). Based on trial testimony, the district court construed such agreements as providing "a monetary allowance to B&B for product Shell expected to be lost in the process of delivery and storage." Pet. App. 122a; see *id.* at 252a-253a (referring to "spillage allowance" in the Shell-B&B contract).[8]

In sum, based on the extensive trial record, the district court correctly found that "[f]or over twenty years, Shell 'arranged for' the sale for profit of D-D with actual knowledge that D-D would spill and be released into the soil during the delivery and unloading process," Pet. App. 259a, in which "Shell was an active participant," *id.* at 204a. The court of appeals correctly affirmed the district court's decision that Shell is liable under CERCLA because, in light of those circumstances, Shell "arranged for disposal" of hazardous substances.

B. Shell Identifies No Sound Basis For Limiting Arranger Liability Where A Manufacturer Engages In Transactions That It Knows Will Directly Result In Disposals Of Its Hazardous Substances

In addition to contending that Section 107(a)(3) is limited to transactions whose *purpose* is to dispose of

[8] Although Shell describes that allowance as "a price discount to meet competition" (Br. 30), that explanation is inherently unlikely, since an allowance for "shrinkage" at the time of unloading would be a highly unusual way of providing a discount to adjust for competitors' prices. The district court rejected essentially the same argument, explaining that Shell's "characterization of the spill allowance as a 'pricing' strategy to meet competition is not persuasive," Pet. App. 259a-260a, and Shell identifies no basis for this Court to reject the district court's reasonable interpretation of the documentary record.

hazardous substances, Shell offers three further bases for avoiding arranger liability. Each lacks merit.

1. Lack of intent to dispose of a hazardous substance during a transaction does not preclude arranger liability where the arranger has advance knowledge of the disposal

Shell contends (Br. 18-21) that it cannot be liable under Section 107(a)(3) because its objective was to supply a useful product rather than to dispose of a hazardous substance. As discussed above (pp. _, *supra*), that argument ignores the fact that spills and leaks of hazardous substances were a known and recurring consequence of the deliveries for which Shell arranged. Although the delivery of a useful product was the ultimate *purpose* of the arrangement, Shell's continued participation in the delivery, with knowledge that spills and leaks would result, was sufficient to establish Shell's intent to dispose of hazardous substances.

Shell's invocation (Br. 19) of circuit-court cases involving the "mere sale of a useful product" is therefore misplaced. The question in those cases was whether sellers could be held liable as arrangers for the *ultimate* disposal of the product after the purchaser had incorporated it into another product or had put it to its intended use. In that context, some courts of appeals have held that the seller is not liable as an arranger for the ultimate disposal absent evidence that the sale included an arrangement for that ultimate disposal. See *Freeman* v. *Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 775 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990);

but cf. *Catellus Dev. Corp.* v. *United States*, 34 F.3d 748, 750-752 (9th Cir. 1994) (arranger liability from sale of spent batteries for extraction of lead plates).

Here, by contrast, Shell was not held liable for contamination resulting from the application of its pesticides (the useful product) to a farmer's fields or the subsequent disposal of the contaminated soil. Rather, its liability is for the portion of product that was never used for its intended purpose but was disposed of at the time of delivery through spilling or leaking. See Pet. App. 52a-53a. The decisions on which Shell relies simply recognize that the causal link between a transaction and a subsequent disposal of the relevant product may sometimes be too attenuated to support arranger liability. That potential limit on Section 107(a)(3) liability has no application here, where the disposal of hazardous substances occurred during deliveries that Shell closely monitored and superintended.[9]

[9] Shell's reliance (Br. 20-21) on *Amcast Industrial Corp.* v. *Detrex Corp.*, 2 F.3d 746 (1993), cert. denied, 510 U.S. 1044 (1994), is also misplaced. In *Amcast*, the Seventh Circuit held a manufacturer liable as an owner for spills of a hazardous substance that occurred during deliveries from its own trucks to a customer. See *id.* at 750. The court also held that the manufacturer was not liable as an arranger for spills that occurred during a common carrier's delivery of the same substance. See *id.* at 751. The court did not suggest, however, that the manufacturer had exercised any control over the latter deliveries other than hiring the carrier, let alone the extent of control found to have been exercised by Shell here. Nor did it suggest that the manufacturer, like Shell, was aware that disposals (in the form of spills and leakage) of hazardous substances ever occurred during those deliveries, let alone during every delivery. See *ibid.* (limiting arranger liability for "accidents" by transporters hired "in good faith").

2. Section 107(a)(3) encompasses the disposal of hazardous substances through spills and leaks

Shell contends (Br. 21-25) that liability under Section 107(a)(3) requires disposal of hazardous waste, and that the term "waste" does not encompass "useful products sold new for consumer use." That argument lacks merit.

Section 107(a)(3) provides that a person is liable if he "arranged for disposal * * * of hazardous substances owned or possessed by such person." 42 U.S.C. 9607(a)(3). There is no dispute that Shell's products constituted "hazardous substances." In arguing that arranger liability may not be premised on disposal of the products at issue here, Shell relies not on Section 107(a)(3), but on definitional provisions under which the term "disposal" is defined to mean "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water." 42 U.S.C. 6903(3); see 42 U.S.C. 9601(29) (providing that the term "disposal" as used in CERCLA shall have the meaning provided in 42 U.S.C. 6903(3)).

To the extent that the term "hazardous waste" has a narrower reach than the term "hazardous substance," Congress's decision to use the latter term in Section 107(a)(3) must be treated as advertent. Because Section 107(a)(3) specifies the type of material ("hazardous substances") whose disposal is covered, the Court should not ascribe to Congress the self-defeating intent to narrow the range of covered materials through the definition of "disposal." See, *e.g.*, *Louisiana & Nashville R.R.* v. *Mottley*, 219 U.S. 467, 475 (1911) ("We must have regard to all the words used by Congress, and as far as possible give effect to them."). The most natural reading of the various provisions taken together is that, for purposes of determining arranger liability under Section

107(a)(3), 42 U.S.C. 6903(3) identifies the *actions* that constitute "disposal," but Section 107(a)(3) identifies the *object* of those actions, *i.e.*, the materials whose disposal is covered. See Pet. App. 216a-217a.[10]

3. Arranger liability does not require ownership or actual control of the hazardous substance at the time of disposal

Shell contends (Br. 26-27) that, in order to be liable as an arranger under Section 107(a)(3), a manufacturer must either own or have "actual control" of the hazardous substance at the time of its disposal. That is incorrect.

Section 107(a)(3) imposes liability on a person who "by contract, agreement, or otherwise arranged for disposal * * * of hazardous substances owned or possessed by such person." 42 U.S.C. 9607(a)(3). By its terms, that provision applies if the person upon whom liability is imposed owned or possessed the relevant substances when the arrangement for disposal was made. Liability under Section 107(a)(3) does not turn on whether the arranger retained ownership or possession at the time of disposal. The provision also clearly contemplates that some "other party or entity" may dispose

[10] Shell's argument, if accepted, could not be limited to arranger liability under Section 107(a)(3). For example, Section 107(a)(2) imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. 9607(a)(2). Under Shell's reading, spills or leaks of a potentially useful product (*e.g.*, cyanide) into the soil or water would not constitute "disposal" of that substance, and Section 107(a)(2) would not apply. That reading would undermine Congress's effort to cover inadvertent spills and leaks by including them within the definition of "disposal," and it would leave a substantial unintended gap in CERCLA's remedial scheme.

of the hazardous substance. *Ibid.* Accordingly, a person who arranges to have his hazardous substances disposed of by another is liable for the consequences of that disposal arrangement, regardless of which entity (the source or disposer) has title or possession when disposal occurs.

Shell's further contention (Br. 26-27) that, at a minimum, an arranger must exercise "actual control" of the hazardous substances at the time of disposal is also inconsistent with the statutory text. Such a requirement would read the phrase "by contract, agreement, or otherwise arranged for" out of Section 107(a)(3). In any event, as discussed above (pp. 20-23, *supra*), Shell did exercise substantial control over the hazardous substances at the time of disposal.

If ownership or actual control at the time of disposal were legally dispositive, an arranger could easily avoid liability under Section 107(a)(3). In the ordinary case when a waste hauler picks up a drum of hazardous substances from the arranger, the drum is no longer possessed or controlled by the arranger. And the parties could readily provide by contract for the immediate transfer of title to the hauler at the time of pickup. Congress surely did not intend for arrangers to escape CERCLA liability in that prototypical arrangement for disposal of hazardous substances. See S. Rep. No. 848, *supra*, 31, 33-34 (CERCLA's liability regime "provides incentives to all involved with hazardous substances to assure that such substances are handled with the utmost care").[11]

[11] Neither the district court nor the court of appeals based its arranger liability holding on a determination of which entity (Shell or B&B) held title to the D-D after its tender for delivery. The district court found that the point at which title to the D-D transferred from Shell to

II. THE DISTRICT COURT ERRED IN REFUSING TO HOLD PETITIONERS JOINTLY AND SEVERALLY LIABLE WHEN PETITIONERS FAILED TO ESTABLISH A REASONABLE BASIS FOR APPORTIONMENT

The court of appeals correctly held that, although the single harm at B&B's facility was theoretically capable of apportionment under established common-law principles, petitioners which elected to pursue a "'scorched earth,' all-or-nothing approach to liability," Pet. App. 236a had failed to prove any reasonable basis for determining their respective contributions to that harm. The thrust of the court of appeals' analysis was not that a more precise and defensible apportionment could have been made based on the record before the district court. Rather, the court of appeals explained that, largely because petitioners had pursued a trial strategy of denying *any* liability for the costs of the governments' cleanup activities, the existing evidentiary record did not provide a reliable basis for apportionment. There is no basis for the Court to overturn that determination.

B&B was not as clear-cut as Shell suggests (Br. 5, 26). As the court explained, if a tanker truck arrived at B&B's facility and began unloading the D-D, but it subsequently became apparent that the bulk storage tank was inadequate for receiving and storing the D-D, Shell had the right to direct the tanker truck to return to Shell's facility. Pet. App. 212a. Thus, although B&B gained "stewardship" once Shell's tanker truck arrived at the facility, legal title did not necessarily pass to B&B at that time. *Id.* at 124a, 212a.

A. Consistent With Restatement Principles, CERCLA Liability For A Single Harm Is Joint And Several Unless The Liable Party Proves A Reasonable Basis For Apportionment

1. When the government performs its own cleanup of a facility, Congress provided, subject to limited affirmative defenses not applicable here, that four classes of persons are liable for "*all* costs of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A) (emphasis added).[12] That provision reflects Congress's considered judgment that, as between those with a specified connection to hazardous substances and those with none (*i.e.*, the taxpaying public), the former should be responsible for the costs of cleanup. See 126 Cong. Rec. 31,978 (1980) (statement of Rep. Jeffords) (CERCLA "places the costs of releases of hazardous waste on the sector most responsible for pollution and which benefits most from chemical production rather than on the victim or taxpayers."); p. 3, *supra*.[13]

[12] Petitioners do not contend that the United States' costs were "inconsistent with the national contingency plan."

[13] Contrary to Shell's suggestion (Br. 25 n.7, 43), the availability of the Superfund to finance cleanups does not demonstrate that Congress intended the Superfund, rather than the parties liable under CERCLA, to bear the cost of cleanups when one responsible party is insolvent. Although the United States may use the Superfund (when certain statutory conditions are met) to finance cleanup efforts, Congress intended that the fund would be replenished through cost-recovery suits brought under CERCLA Section 107(a) so that the covered parties that CERCLA deems responsible for contamination bear the cost. See *Bestfoods*, 524 U.S. at 55-56; cf. S. Rep. No. 848, *supra*, 13. Congress similarly did not intend the now-expired taxing regime for the Superfund to release from liability manufacturers who otherwise qualify as liable

CERCLA does not specifically address the proper allocation of cleanup costs in cases where multiple parties share responsibility for contamination at a particular facility. The courts of appeals have uniformly held, however, and petitioners agree, that the decision whether to impose joint and several liability under those circumstances, or instead to apportion the costs of cleanup among the various responsible parties, should be guided by common-law principles. See pp. 3-4, *supra*; Shell Br. 32; Railroads Br. 7. Petitioners also agree (Shell Br. 37; Railroads Br. 6), consistent with Congress's apparent endorsement of the approach taken in the seminal case of *Chem-Dyne* (H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. I, at 74 (1985)), that Restatement principles provide the starting point for that inquiry.[14]

2. Under the Restatement, damages for a single harm can be apportioned among multiple causes only if "there is a reasonable basis for determining the contri-

parties under CERCLA. See Letter from GAO to Hon. James M. Jeffords regarding the GAO-04-475R Superfund Program 1 (Feb. 18, 2004).

[14] As noted above, all references to the Restatement refer to the Restatement (Second). In May 1999, the American Law Institute adopted the Restatement (Third) Torts: Apportionment of Liability (Third Restatement), primarily in response to the increased use of comparative responsibility. See *id.* § 1, cmt. a. The Third Restatement employs the same basic approach to apportionment as the Restatement. Compare Third Restatement § 26 with Restatement § 433A. In any event, the Restatement was in effect both when CERCLA was originally enacted and when it was amended in 1986, and it is therefore the relevant source of common-law norms. In addition, many States still retain full joint and several liability, and most of the recent departures from that traditional rule have come through legislative enactments, not judicial decisions developing common-law principles. See *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 164-165 (2003).

bution of each cause to a single harm." Restatement § 433A(1)(b). When two or more liable parties bring about a single harm, and one or more of them seeks to limit its liability on the basis that the harm is capable of apportionment, the burden of proof as to the apportionment is on such party. Restatement § 433B(2). That burden includes both the burden of production (*i.e.*, of presenting evidence sufficient to establish its share of the harm) and the burden of persuasion (*i.e.*, of demonstrating by a preponderance of the evidence that apportionment is warranted). Restatement § 433B cmt d. That is because, "[a]s between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former." *Ibid.* Petitioners do not dispute that the burden of proving a reasonable basis for apportionment is on CERCLA defendants. See Shell Br. 37; Railroads Br. 30.

The Restatement recognizes that "[t]here are kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible." Restatement § 433A cmt. d. The Restatement also gives various examples of situations where "reasonable assumption[s]" may be made, explaining, *inter alia*, that if cattle of two or more owners trespass and destroy a crop, the harm may be apportioned among the owners on the basis of the number of cattle owned by each. *Ibid.* Similarly, if two factories pollute a stream and interfere with another's use of the water, the harm may be apportioned "on the basis of evidence of the respective quantities of pollution discharged into the stream." *Ibid.*

The Restatement also recognizes, however, that "[c]ertain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division." Restatement § 433A, cmt. i. As Congress was well aware, that will often be the case for the harms targeted by CERCLA: "An indivisible harm is frequently the situation at hazardous waste sites where many parties have contributed to the contamination or other endangerment and there are no reliable records indicating who disposed of the hazardous wastes (or in what quantities)." 126 Cong. Rec. at 31,966 n.* (Letter from Assistant Attorney General, Office of Legislative Affairs to Chairman, Subcomm. on Transportation and Commerce, House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. (Dec. 1, 1980)). Thus, while the Restatement allows for the limited use of assumptions to determine the contribution of each cause to a single harm, those assumptions must be reasonable, based on the evidence, and grounded in principles of causation.

The Restatement makes clear that, where harms cannot be apportioned on a reasonable basis, the court should not make "an arbitrary apportionment for its own sake" or simply to mitigate the severity of joint and several liability. Restatement § 433A cmt. i. Indeed, the Restatement contemplates that joint and several liability may be imposed even when "some of the causes are innocent." *Ibid.* Accordingly, the courts of appeals have recognized that apportionment under the Restatement "is guided not by equity" but "by principles of causation alone." *United States* v. *Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir.), cert. denied, 534 U.S. 1065 (2001); see, *e.g.*, *United States* v. *Township of Brighton*, 153 F.3d 307, 319 (6th Cir. 1998); *United States* v. *Monsanto*, 858 F.2d 160, 171 n.22 (4th Cir. 1988), cert. denied, 490 U.S.

1106 (1989); *United States* v. *Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993); cf. *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2339 (2007) ("a defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim").

If a party found liable under Section 107(a)(4)(A) cannot establish a basis for apportionment with the reliability that Restatement principles require, but nevertheless maintains that joint and several liability is unfair or disproportionate under the particular circumstances of the case, it may pursue a contribution action against other responsible parties under CERCLA Section 113(f)(1). Section 113(f)(1) provides that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. 9613(f)(1); see Restatement § 886A(2) (right of contribution exists for tortfeasor "paying more than his equitable share of the common liability"). That provision gives the court broad authority to devise a fair allocation of costs *among* the responsible parties *without* transferring those costs to taxpayers who have no particularized nexus to the relevant contamination. That provision would be largely superfluous if the court had similar equitable discretion in making the initial determination of liability under Section 107(a)(4)(A).

To be sure, the availability of a Section 113(f)(1) contribution action may be of little practical benefit to petitioners here in light of B&B's insolvency. The Restatement does not suggest, however, that the standards for proving apportionment may be relaxed in such cases in order to compensate for the diminished likelihood of obtaining contribution. To the contrary, the Restate-

ment specifically identifies the insolvency of a co-defendant as a factor weighing *against* apportionment. The Restatement provides that, even if a defendant carries its burden on apportionment, the defendant may still be held jointly and severally liable if the circumstances are exceptional, as when "one of two tortfeasors is so hopelessly insolvent that the plaintiff will never be able to collect from him the share of the damages allocated to him." Restatement § 433A cmt. h.[15] That principle is consistent with CERCLA's purpose of protecting the public fisc.[16]

B. The District Court Erred As A Matter Of Law By Declining To Impose Joint And Several Liability After Petitioners Failed To Establish Any Reasonable Basis To Apportion Liability

It is undisputed that this case involves a single harm, consisting primarily of a plume of contaminated groundwater that threatens the drinking water supply. Pet.

[15] Because the court of appeals concluded that petitioners had failed to establish a sufficient basis for apportionment under general Restatement principles, it declined to determine what effect Restatement § 433, comment h, might otherwise have on the apportionment analysis. See Pet. App. 32a n.27. This Court likewise need not consider comment h if it agrees that the district court's apportionment lacked a reasonable evidentiary basis. If this Court disagrees, however, and concludes that the district court's apportionment was otherwise sound, comment h provides an alternative basis for affirming the judgment below.

[16] Some courts have suggested that, in light of that purpose and CERCLA's strict-liability regime, the burden of proving divisibility in CERCLA cases should be more demanding than under general Restatement principles. See, *e.g.*, *United States* v. *Capital Tax Corp.*, 545 F.3d 525, 535 & nn.8-9 (7th Cir. 2008); *Hercules, Inc.*, 247 F.3d at 715-717. The Court need not decide whether that view is correct because petitioners failed (indeed, made no meaningful effort) to establish bases for apportionment that would satisfy Restatement standards.

App. 245a-246a. At trial, both the Railroads and Shell contended that they did not cause *any* part of that harm. Neither the Railroads nor Shell attempted (even in the alternative) to present or prove a reasonable basis for determining the contribution of each to the contamination.

Once the district court rejected petitioners' theory of the case and determined that petitioners were liable parties, the imposition of joint and several liability should have followed naturally from petitioners' failure even to attempt to identify and prove any reasonable basis for apportionment. Instead, the district court, believing that the imposition of joint and several liability would be inequitable under the circumstances of this case, scoured the record for evidence on which very rough approximations of petitioners' comparative responsibilities might be based. It may well be that no demonstrably *better* apportionment could have been made given the record before the court. The absence of evidence from which a sufficiently reliable apportionment could be drawn, however, was the direct result of petitioners' own litigation strategy, and there is no basis for this Court to relieve petitioners of the consequences of that strategy now that it has failed to absolve them of all liability. In any event, under established Restatement principles, the party seeking apportionment bears the burden of proof, and the court of appeals correctly held that petitioners failed to carry their burden here.

1. The Railroads' trial theory was that no activity on the Railroad parcel resulted in contamination at the facility. Although the Railroads provided expert testimony purporting to estimate the total amount of contamination in the facility's subsurface, that testimony assumed that none of the facility's contamination was

caused by disposals on the Railroad parcel. J.A. 304-305; Railroads C.A. E.R. 188-191. Accordingly, the Railroads' only argument and evidence as to their contribution to the harm was that they contributed zero.

Shell took a similar tack. Shell's expert testified that it was "infinitely more likely than not" that D-D could not get from the delivery areas to the areas from which it posited that the contamination had originated. J.A. 283-284. Thus, Shell's trial theory was that Shell was not a cause of the harm at all.

The district court, however, rejected the Railroads' and Shell's theories and evidence. The court further found that Shell "did not present evidence how its products' contribution to the contamination at the Arvin facility can be apportioned." Pet. App. 252a. Rather, the court explained, the Railroads' and Shell's trial strategy was a "'scorched earth,' all-or-nothing approach to liability," in which "[n]either acknowledged an iota of responsibility." *Id.* at 236a.

That should have been the end of the matter. Litigants must live with the consequences of their own strategic choices in the adversarial system. See, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941) ("[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide."). This Court has so held in many contexts, including in capital cases. See, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 420, 437 (2000) (state prisoner "must be diligent in developing the record and presenting, if possible, all claims of constitutional error" and cannot pursue on habeas "facts and issues which a

prisoner made insufficient effort to pursue" earlier). There is no reason for a different rule in this context, where (as here) sophisticated parties are represented by sophisticated counsel.[17] When a CERCLA defendant categorically denies liability and the court rejects that position, the defendant faces the prospect of joint and several liability and cannot go back and claim an entitlement to apportionment based on a record that does not support apportionment.[18]

2. Rather than hold petitioners to the consequence of their own litigation strategy, the district court "independently" performed what it called "the equitable apportionment analysis demanded by the circumstances of the case." Pet. App. 236a-237a. The district court's decision to undertake that apportionment without the parties' assistance rested on three interrelated legal errors.

[17] In *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 186-187 (2d Cir. 2003), cert. denied, 540 U.S. 1103 (2004), the CERCLA defendant (like petitioners) argued that its liability was zero. The Second Circuit rejected that argument, determined that the defendant had introduced no evidence on the limited nature of its liability, and therefore held it jointly and severally liable. *Ibid.*

[18] Largely for the reasons stated in the text, the Railroads are wrong in suggesting (Br. 57-59) that the imposition of joint and several liability in this case raises serious constitutional concerns. Contrary to the Railroads' assertion (Br. 58), the court of appeals did not "interpret[] CERCLA to impose joint and several liability in all but extraordinary cases," and any constitutional issues that such a scheme might implicate are not presented here. Rather, petitioners pursued a deliberate strategy of disclaiming *all* liability and forgoing any effort to establish the share of the harm for which they could properly be held responsible. See Pet. App. 47a (noting that Shell likely could have provided evidence supporting apportionment but declined to do so, "most likely because Shell put its eggs in the no-liability basket"). Holding petitioners to the consequences of that choice creates no meaningful constitutional difficulties.

First, the district court assumed that the "circumstances of this case" primarily the insolvency of the party (B&B) most responsible for the contamination "demanded" apportionment. Pet. App. 237a; see *id.* at 245a (deeming it "manifestly inequitable" to allocate B&B's orphan share to petitioners). That was incorrect. As explained above (pp. 34-35, *supra*), the Restatement specifically discusses the example of an insolvent co-defendant. Rather than identifying that circumstance as a ground for relaxing the standards governing apportionment, the Restatement treats the insolvency of a co-defendant as a factor that may support joint and several liability even if apportionment would be otherwise justified. That approach furthers CERCLA's purpose of ensuring that governmental plaintiffs (and the taxpayers they represent) are not required to bear cleanup costs when there exists a solvent party with a cognizable nexus to the contamination. See p. 3, *supra*.[19] Although the Restatement does not *preclude* apportionment in cases involving insolvent co-defendants, it is flatly inconsistent with the district court's treatment of such insolvency as a factor *supporting* apportionment.

Second, the district court treated petitioners and the United States and the State as equally responsible for the absence of evidence and argument directed at the question of apportionment. In explaining its decision "to independently perform the equitable apportionment analysis," the court stated that "[a]ll parties" had "ef-

[19] See 126 Cong. Rec. at 26,788 (statement of Rep. Jeffords) ("The imposition of mandatory apportionment could result in attempts by the parties liable for a release of hazardous waste to allocate a large portion of the liability to insolvent defendants. * * * We should not allow the responsible parties to evade the costs of cleanup at the expense of the taxpayers.").

fectively abdicated providing any helpful arguments to the court." Pet. App. 236a-237a. As the district court elsewhere recognized, however, "[o]nce [CERCLA] liability has been established, the burden shifts to the defendant to demonstrate, by a preponderance of the evidence, that there exists a reasonable basis for divisibility." *Id.* at 235a. Because petitioners bore the burden of proof on this issue, the governments' failure to provide evidence and argument supporting a *different* apportionment (or establishing that apportionment was infeasible) could not justify the court's use of estimates that would otherwise have been insufficiently precise.

Third, the district court conflated the present cost-recovery suit under Section 107(a)(4)(A) with the distinct, equitable *contribution* action available to petitioners under Section 113(f). The court stated that, "[w]hile § 113(f)(1) directs courts to allocate cleanup costs between responsible parties 'using such equitable factors as the court determines are appropriate,' it does not limit courts to any particular list of factors. The statute's expansive language instead affords a district court broad discretion to balance the equities in the interests of justice." Pet. App. 239a. The district court's evident premise—*i.e.*, that the court possessed the same "broad discretion" in determining whether and how liability should be apportioned in the cost-recovery suit under Section 107(a)(4)(A) is wholly incorrect. See pp. 33-35, *supra*.[20]

[20] The district court repeatedly confirmed throughout the post-trial proceedings that its entire apportionment analysis—including but not limited to the decision to undertake it—was driven by its view that the imposition of joint and several liability would be inequitable under the circumstances of this case. At the hearing on the parties' motions to amend the court's findings of fact and conclusions of law, for example,

The legal errors described above led the district court to undertake an intricate apportionment analysis despite the failure of the parties who bore the burden of proof to offer any pertinent evidence or argument. The court's mode of procedure also deprived the government of a fair opportunity to respond to the court's theories of apportionment and to rebut their factual underpinnings an opportunity the governments would have had if those theories had been advanced by petitioners themselves. See, *e.g.*, *Burdett* v. *Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992) (reversing the trial court where it "changed the plaintiff's theory of the case after the time had passed for the defendant to present contrary evidence").

Petitioners suggest that, despite the rough nature of the district court's approximations, the ultimate apportionment should be sustained because the court chose to err on the side of overestimating petitioners' contributions to the harm at the relevant facility. See Railroads Br. 46-47. The Railroads emphasize (*ibid.*) that the district court provided an adequate "safety margin," increasing the Railroads' estimated share from 6% to 9% to allow for calculation errors. Because the correct number is likely lower than 9%, the Railroads argue (Br. 47), imposing joint and several liabilty is unjustifiable.

That line of argument fails on two levels. First, given the significant gaps in the district court's apportion-

the court stated that it "did what [it] thought was right in accordance with the law and equity because we still have an allocation and equitable proceeding." J.A. 612. But to the extent the court perceived an overriding equitable imperative to proceed with apportionment notwithstanding the sparseness of the record before it, those evidentiary gaps were the result of petitioners' own litigation choices.

ment analysis as discussed in Pt. II(C), *infra*, it is speculative whether the court's apportionment actually overstates petitioners' appropriate shares of the total liability. Second, under applicable Restatement principles, the propriety of apportionment turns on whether the liable party has established through evidence the portion of the harm that it caused. Petitioners cite no authority for the proposition that a liable party can in effect stipulate to a percentage share that lacks such an evidentiary foundation simply because it appears likely that the share overstates its actual contribution to the overall harm.

C. The District Court's Unsubstantiated Assumptions And Gross Approximations Do Not Constitute A Reasonable Basis To Apportion The Harm In This Case

The district court's equitable apportionment analysis, conducted on a sparse record without meaningful argument from petitioners, involved an array of unsubstantiated assumptions and gross approximations. Those include: (1) that each party's share of the ultimate harm is proportional to each's party's volumetric contribution to the contamination (irrespective of the relative toxicities and costs of remediation of the different chemicals); (2) that the Railroads' volumetric contribution to the contamination is proportional to the percentage of its land area and duration of ownership; (3) that dinoseb and Nemagon comprised 2/3 of the contamination, so that the Railroads' liability should be further reduced by 1/3 (because no D-D originated from their parcel); and (4) that Shell's volumetric contribution to the contamination can be estimated from anecdotal evidence and incomplete sales records. As discussed below, the district court's assumptions and ap-

proximations do not provide a reasonable basis for apportioning the harm in this case.

1. There is no reasonable basis to assume that each petitioner's share of the ultimate harm is proportional to its volumtric contribution to the contamination

As an initial matter, there is no reasonable basis to assume that the harm in this case is divisible. See Pet. App. 172a ("plume poses an indivisible threat"). Under the Restatement, joint and several liability is appropriate "where either cause would have been sufficient in itself to bring about the result," as in the case of "merging fires which burn a building" or two companies polluting a stream from which cattle drink and die. Restatement § 433A cmt. i.

In this case, the threat to drinking water and need for remediation presumably would exist even if the plume contained only the hazardous substances traceable to Shell's spillage or only the hazardous substances from the Railroad parcel. Either source of contamination therefore likely was "sufficient in itself to bring about the result" (*i.e.*, contamination requiring CERCLA remediation) here. See Restatement § 433A cmt. i.[21] It is possible that, even if pollution from either

[21] As the Seventh Circuit has explained for cases in which contamination may be attributable to multiple sources:

> It is easy to imagine a case in which, had X not polluted a site, no clean-up costs would have been incurred; X's pollution would be a necessary condition to those costs and it would be natural to think that he should pay at least a part of them. But suppose that even if X had not polluted the site, it would have to be cleaned up—and at the same cost—because of the amount of pollution by Y. * * * [T]hat should not necessarily let X off the hook. * * * In that case, the conduct of X and the conduct of Y would each be a sufficient but not

Shell or the Railroads standing alone would have induced EPA to undertake remediation, the presence of contaminants from multiple sources compounded the environmental harm or caused the remediation to be more costly. Petitioners made no effort, however, to prove at trial that this was so. EPA based its remediation decisions at the facility not on the total mass or volume of the contaminants, but rather on the fact that the level of contamination from each primary contaminant greatly exceeded the applicable maximum concentration levels set by the EPA and State. Pet. App. 97a. Accordingly, absent a reasonable basis in the record to find otherwise (and petitioners failed to provide one), petitioners should be jointly and severally liable for the entire harm on that ground alone.

Even assuming that petitioners' respective contributions were not independently sufficient to have caused the harm, there is no reason to assume that the ultimate harm is directly proportional to the volume of hazardous substances in the plume attributable to each petitioner. The plume of contamination underlying the facility contains multiple substances, including dinoseb and constituents of D-D and Nemagon. Pet. App. 174a. The share of harm from a particular volume of waste therefore depends on a number of variables, including the respective levels of toxicity and cost of remediation for each constituent present. (For example, if dinoseb were much more toxic or much more expensive to extract than D-D or Nemagon, that might be a basis to conclude

> a necessary condition of the clean up, and it would be entirely arbitrary to let either (or, even worse, both) off the hook on this basis.

Browning-Ferris Indus. of Ill., Inc. v. *Ter Maat*, 195 F.3d 953, 958 (7th Cir. 1999), cert. denied, 529 U.S. 1098 (2000).

that the Railroads are responsible for more of the harm.) Consistent with their trial strategy of simply denying all liability, petitioners identify no record support for the district court's assumption that each party's contribution to the overall harm is proportional to the relative volume of hazardous substances attributable to it. As a result, the district court lacked a reasonable basis for apportioning the harm based on the volumes of contamination attributable to each petitioner.[22]

2. There is no reasonable basis to assume that the Railroads' contribution to the contamination was proportional to its land area and duration of ownership

Even assuming that the volume of the Railroads' contribution to the contamination is a sufficient basis on which to apportion harm, the district court's estimate for that contribution lacks a reasonable basis.

a. The Railroads assert (Br. 41-45) that the district court's analysis falls within the "long tradition" of apportionment of harm based on geography and time. That is incorrect. With respect to geography, the court concluded that, because the Railroads owned only 19.1%

[22] The district court's reliance on *In re Bell Petroleum Services, Inc.* to support such an assumption is misplaced, because that case involved a *single* hazardous substance (such that potential variations among the toxicities and costs of remediation of various constituents were not at issue). See Pet. App. 248a (citing 3 F.3d 889, 903-904 (5th Cir. 1993)). The Restatement's illustrations (see p. 32, *supra*) of trespassing cattle damaging crops, or two factories polluting a stream and interfering with another's use of the water, are similarly inapt. The presumption underlying those examples—that each cause of the harm has roughly the same effect—does not apply here. As noted above, the plume contains various hazardous substances, but there is no evidence as to relative toxicities of those substances or the relative costs of remediating them.

of the facility, the Railroads' liability should be reduced proportionally. But that is not an appropriate use of geographic divisibility. Geographic divisibility is used to differentiate between two or more distinct harms, such as non-contiguous areas of contamination or distinct plumes of groundwater contamination, rather than to apportion responsibility for a single harm. See, *e.g.*, *Hercules, Inc.*, 247 F.3d at 717-718. For example, if two portions of a landfill are contaminated with hazardous substances and remediated, a liable party could demonstrate that none of its hazardous substances contaminated one of those portions. Indeed, that principle explains why Shell was not liable for the geographically-isolated dinoseb hot spot, which did not contain Shell chemicals. Pet. App. 56a & n.35.

The Railroads identify no case where a court has divided a single harm based on the percentage of the facility that a liable party owned. The most analogous case of which the government is aware confirms that the fraction of the facility that the Railroads owned is not a reasonable basis to determine the harm attributable to it. See *United States* v. *Rohm & Haas Co.*, 2 F.3d 1265 (3d Cir. 1993), overruled on other grounds by *United States* v. *E.I. DuPont De Nemours & Co.*, 432 F.3d 161, 162-163 (3d Cir. 2005) (en banc). In *Rohm & Haas Co.*, the Third Circuit held jointly and severally liable a party that owned only 10% of the land area of the facility at issue. 2 F.3d at 1280-1281. In doing so, the Third Circuit rejected the party's request for apportionment based on its percentage of ownership, explaining that "[t]he fact that [defendant] only owns a portion of the site says nothing about what portion of the harm may

fairly be attributed to it." *Id.* at 1280. The same is true here.[23]

Even assuming that there was a reasonable basis to find that spills on the Railroad parcel were proportional to its size, the district court had no reasonable basis for assuming whether those spills were more or less likely to contaminate the subsurface. That would depend on a number of variables—*e.g.*, the presence of water, properties of the particular contaminant, porosity of the surface and soil, wind and temperature—for which the district court failed to account. Without knowing more

[23] The Railroads' contention (Br. 48-51) that divisibility based on geography is particularly appropriate given EPA's latitude in defining a CERCLA "facility" misses the mark. First, the text of Section 107(a)(1)-(2) makes clear that Congress chose to assign liability for contamination based on ownership of a facility rather than on ownership of a particular tract of land. The Railroads do not dispute that ownership of *part* of the facility brings them within the statute's coverage. Second, while landowners are free to argue that EPA's designation of a particular "facility" is overly broad, the Railroads here failed to challenge EPA's inclusion of their parcel in its initial designation of the facility (despite actual knowledge of that designation), and they did not appeal the district court's conclusion that the Railroad and B&B parcels are a single facility. Pet. App. 113a, 172a-173a. Third, the Railroads did not attempt at trial to show that they caused contamination in one isolated part of the facility but not another. Fourth, the Railroads' characterization (Br. 4) of themselves as innocent landowners ignores the fact that the Railroads profited from their lease with B&B and stood by while B&B released hazardous wastes into the environment. As the district court noted, "[a]s the lessor-land owner, the Railroads had a responsibility to ensure that all activities affecting their leased parcel complied with all applicable environmental laws." *Id.* at 258a-259a. It is also significant in that regard that, although CERCLA provides a form of "innocent owner" defense in certain cases where contamination is caused by "an act or omission of a third party," the defense is unavailable if the relevant "act or omission occurs in connection with a contractual relationship" with the landowner. 42 U.S.C. 9607(b)(3).

about those variables, in conjunction with the timing and location of the releases, the relative level of *spills* on each parcel says little about the relative level of actual *contribution* to the harm from each parcel. Where the Railroads' only trial evidence that the activity on the Railroad parcel did not contribute at all to the harm at the facility—was rejected by the district court, there is no reasonable basis for determining the relative volumetric contribution from the Railroad parcel to the overall contamination. See Pet. App. 248a ("no party has specifically documented the relative contributions of contamination from either parcel"); *id.* at 252a ("no evidence to quantify the difference in volume of the releases" from the Railroad and B&B parcels).

b. Nor is this a situation where, as the Railroads assert (Br. 44-45), the harm is divisible based on time (*i.e.*, based on the fact that the Railroads were owners for 45% of the facility's lifespan). The Restatement's conception of temporal divisibility is very different from that adopted by the district court and now endorsed by the Railroads. The Restatement provides that "if two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused a separate amount of harm, limited in time, and that neither has any responsibility for the harm caused by the other." Restatement § 433A cmt. c. In that example, it is the same plant—presumably generating the same pollution at the same rate such that the time each defendant operated the plant may be a reasonable approximation of the harm to the stream it caused.

The harm here, however, was not caused by *successive* operation of the *same* harm-causing activity. Rather, the addition of the Railroad parcel permitted

B&B's facility to expand—presumably expanding its harm-causing activities. Thus, unlike in the Restatement example, there is no reasonable basis to assume that the harm is proportional to the duration of operation. To the contrary, it is more reasonable to assume that the facility *increased* its contaminating activities after the Railroads became involved, such that temporal divisibility would *underestimate* their contribution.

The district court's approach also cannot be reconciled with the fact that Section 107(a)(1) makes the *current* owner and operator of a facility liable, even if all the contamination occurred before its ownership. Under the district court's temporal approach, that owner's share of liability would always be zero. That could not have been what Congress had in mind. The prospect of that anomalous result shows not only that the district court's use of temporal divisibility was flawed, but also that landowner liability is not readily divisible in the same way as operator or arranger liability.

3. There is no reasonable basis for the district court to assume that 2/3 of the contamination was from dinoseb and Nemagon (and thus discount the Railroads' liability by 1/3)

The district court discounted the Railroads' liability by 1/3 based on its assumptions that none of the D-D contamination requiring remediation originated on the Railroad parcel and that the other two chemicals (dinoseb and Nemagon) contributed to 2/3 of the overall contamination. Pet. App. 251a. The first premise is dubious at best,[24] and the court identified no record sup-

[24] The district court's premise that no D-D originated from the Railroad parcel conflicts with its other findings. For example, the court calculated that the checking of filters on D-D rigs resulted in D-D spills

port for the proposition that dinoseb and Nemagon constituted 2/3 of the total contamination. The supposition (even if true) that two of three contaminants came from the Railroad parcel does not support the district court's conclusion that those two chemicals caused two-thirds of the harm.

4. There is no reasonable basis for using spillage estimates from anecdotes and incomplete records to determine Shell's contribution to the contamination

The district court erred in two ways in its calculation of Shell's volumetric contribution to the contamination. First, the court piled one unsupported assumption onto another to craft its own estimate of the amount of D-D spilled during Shell-controlled deliveries as compared to the total amount of D-D spilled at the facility. Second, the district court's calculation depends on the assumption that every spill of D-D caused the same amount of contamination—an assumption contradicted by the evidence.

a. The district court's estimate of D-D spilled during Shell-controlled deliveries hinges on its assumption that three gallons were spilled during every delivery. See Pet. App. 254a ("It is further assumed that, on average, three gallons spilled during every delivery."). The court's assumption, based on sparse anecdotal evidence (*e.g.*, J.A. 125), fails to account for the obvious possibil-

totaling 20,470 or more gallons, by far the single largest component of the court's total estimated D-D spills of 31,212 gallons. Pet. App. 256a. In turn, the court found that "D-D rigs were parked on the Railroad parcel" (*id.* at 91a); that "[b]efore taking D-D rigs to the field, B&B servicemen put on rubber gloves, opened the strainer caps and checked the filters;" and that such filter checks "resulted in spills of D-D onto the ground" (*ibid.*). The court's own findings therefore indicate that significant D-D spills occurred on the Railroad parcel.

ity that such D-D spills could have been larger on a regular basis. The district court's further estimate that there were 27 Shell-controlled D-D deliveries per year lacks a reasonable basis as well. See Pet. App. 253a-254a. To reach that figure, the court concluded that Shell D-D sales "average[d]" 122,390 gallons per year over the entire 23-year period for which Shell sold agricultural chemicals to B&B at the Arvin Site. *Ibid.* (The court then divided that by an estimated tanker truck delivery capacity of 4,500 gallons to conclude that there were 27 deliveries per year.) *Ibid.* The court based its "average," however, on just a few years of sales data. *Id.* at 89a-90a, 253a. The court did not explain on what basis it assumed that those years were representative of the entire 23 years, and it failed to address potential variables such as market conditions or customer demand. *Ibid.* The court's reliance on that potentially unrepresentative sample was particularly misplaced because Shell bore the burden of proof on apportionment and was in the best position to produce the full complement of sales records.

The district court applied the same kinds of assumptions to "calculate" that D-D spills from non-Shell controlled activities totaled 29,349 gallons, despite acknowledging that such spills "are not quantified." Pet. App. 254a ("it is assumed that a spill ranged from a cup to a quart" during transfer to bobtail from storage tanks); *id.* at 255a (assuming a 7.5 gallon spill where bobtail truck was washed out); *id.* at 256a (spills "of a quart or less occurred as a result of checking filters on D-D rigs"). The estimates as to non-Shell controlled spills of D-D are flawed in other ways as well. For example, for non-Shell controlled spills from bobtail washing, the district court "assumed that the bobtails were washed

out 70% of the time." Pet. App. 255a. There is no record evidence for the 70% figure. To the contrary, the testimony of a B&B field serviceman (Merryman) suggests that the figure is far lower—resulting in an overestimate of the amount of D-D spilled in non-Shell controlled deliveries and thus underestimating Shell's liability. J.A. 130-133.

b. The court's simplistic calculation also assumes that every gallon of D-D spilled would lead to the same amount of contamination in the subsurface. But that ignores the reality that spill impacts could vary considerably depending on various variables, such as the porosity of the spill site and timing in relation to rainfall or other water events. See Pet. App. 248a (acknowledging that even a "small spill of 1,2-DCP [D-D] could cause substantial groundwater contamination"); see also pp. 47-48, *supra*. For example, the district court's analysis ignores the lining of the sump (one of the sources of contamination) in 1979, where the bobtail trucks were washed out. See Pet. App. 95a ("the sump near the B&B wash rack was lined in 1979"). Rather than account for the much lesser likelihood of groundwater contamination from such non-Shell-controlled activities after 1979, the district court applied the same assumption that every gallon of D-D spilled would result in the same amount of contamination thereby underestimating the percentage of D-D contamination attributable to Shell-controlled deliveries.

In sum, the district court's decision to proceed with an "equitable apportionment" on the sparse record left by petitioners resulted in several critically flawed assumptions. Those assumptions, taken together, do not comprise a reasonable basis for apportioning the harm in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

MICHAEL J. GUZMAN
Acting Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

PRATIK A. SHAH
Assistant to the Solicitor General

PATRICIA K. HIRSCH
Acting General Counsel
Environmental Protection Agency

LISA E. JONES
JAMES R. MACAYEAL
AARON P. AVILA
Attorneys

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APPENDIX

1. 42 U.S.C. 9601(29) provides:

The terms "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. 6903].

2. 42 U.S.C. 6903(3) provides:

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

3. 42 U.S.C. 9607 provides in pertinent part:

Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under

subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance con-

cerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

* * * * *

4. 42 U.S.C. 9613(f)(1) provides:

Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

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